IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 715 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

HUSEN USMAIL

Appearance:

1. Criminal Appeal No. 715 of 1994

MR B D DESAI, APP for Petitioner - State

MR D M SHAH, Advocate for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH
and
MR.JUSTICE H.H.MEHTA

Date of decision: 06/05/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

The State of Gujarat has preferred this appeal under Section 378 of the Code of Criminal Procedure, 1973 (for short, "the Code") challenging the judgement and acquittal order dated 31/03/94, recorded by the learned Additional Sessions Judge at Rajkot, in Sessions Case No. 29 of 1987, whereby the learned Judge acquitted the present respondent from offences punishable under Section 302 and 451 of IPC.

2. As per the case of prosecution before the trial court, the informant - Aaishaben Ibrahimbhai was the wife of deceased - Ibrahimbhai Ismailbhai. The deceased was the brother of the respondent, original accused. As per the case of the informant, the incident took place on 19/01/87 at about 2.00 to 2.30 p.m.. The informant, Aaishaben was cleaning vessels in front of her house and the deceased was lying on his bed inside the room. At that time, the present respondent came to the house of the informant and made an inquiry about his mother. The informant told him that she had not returned from her village. That, thereafter, the respondent placed his motorcycle outside the residence of the informant and went inside the house of the informant. That, thereafter, she heard shouts and therefore, she ran inside the house. At that time, the respondent was found running away with knife in his hand and the deceased had fallen down from the bed. On inquiry, it was conveyed by the deceased to her that the respondent had inflicted a knife blow on the right hand side of his abdomen. Shouts were raised and the neighbors had gathered together there. The deceased was taken to the hospital. FIR was filed. In the meantime, the deceased died on account of the said injuries and therefore, an offence punishable under Section 302 was also registered against the respondent. Investigation was undertaken. The respondent was arrested. At the end of investigation, chargesheet was filed and since the case was exclusively triable by the court of Sessions, it was ordered to be committed to the court of Sessions. The learned Additional Sessions Judge provided the respondent with copies of police papers. Charge was framed. It was read over and explained to the respondent. The respondent pleaded not guilty to the said charge. Therefore, evidence was recorded. As soon as the evidence was over, the trial court recorded further statement of the respondent under Section 313 of the said Code. Arguments were heard. The trial court found that the prosecution had not proved the case against the respondent and

therefore, the respondent was ordered to be acquitted.

3. Feeling aggrieved by the said judgment and acquittal order of the trial court, the State has preferred this appeal before this Court. It has been contended in the memo of appeal, that there was sufficient evidence on record before the trial court to hold the respondent guilty for the aforesaid offences. That the trial court has not properly appreciated the evidence on record. That, therefore, the judgment and acquittal order are illegal and erroneous and deserve to be set aside. The State, has, therefore prayed that the present appeal be allowed, the judgment and acquittal order against the respondent be set aside, the respondent be held guilty for the aforesaid offences and he may be dealt with in accordance with law.

4. On receiving the appeal, it was admitted and Mr.D M Shah, learned advocate appeared to defend the case of the respondent. At the final hearing, we have heard Mr.B D Desai, learned APP for the State and Mr.D M Shah, learned advocate for the respondent. Both of them have taken us through the evidence on record and through the material observations of the trial court made in the judgment.

5. If we go through the evidence on record, we can notice that the prosecution has examined certain witnesses, including the Medical Officer. Dr.Navalbhai Devshankar Shilu, Ex.4 has deposed before the trial court that on 07/02/87 at about 1.40 p.m., he received the dead body of the deceased and carried out the post-mortem. He has described the injuries appearing on the body of the deceased and ultimately, he has stated on oath before the trial court that the deceased died on account of the injuries on his person. The injuries have been described in column no. 17 of the post-mortem note at Ex.6. The last column shows that the deceased died on account of shock resulting from Septicaemia. This shows that the deceased died a homicidal death and that fact was not seriously disputed, before the trial court. Even before this Court, the said fact has not been disputed by the defence, i.e. the respondent before this court.

6. Then, we can turn to other evidence on record. Laldas Manilal Dadhurejiya, Ex.9. is the Executive Magistrate who recorded the dying declaration of the deceased. He stated before the trial court that he had received a yadi from the Police Station and therefore, he proceeded to the hospital to record the dying declaration of the deceased. That, he reached there at about 4.45

p.m., but as the patient was in the operation theatre his dying declaration could not be recorded. Thereafter, on 20/01/87, he again went to the hospital at about 11.45 p.m.. At that point of time, it was ascertained that the deceased was conscious. Therefore, dying declaration was recorded and it has been recorded in Question Answer form. He has produced the same dying declaration at Ex.11.

7. Now, it would be relevant to note here, that from the dying declaration it has come on record that when an inquiry was made from the deceased, it has come to notice that a day before the date of incident, the deceased had a quarrel with his brother. Thereafter, he has also deposed that his brother had inflicted injuries on him. However, it is a matter of evidence that there were in all five brothers. But, it has not been stated by the deceased during the course of his dying declaration, as to which brother had actually caused the said injury to him. The learned advocates for the parties have taken us through the said dying declaration and nowhere, it has been noticed that the name of the respondent has been disclosed by the deponent, involving him in the commission of the offence. In other words, it has never been deposed by the deceased in his dying declaration that the respondent had inflicted knife injury on the 'person' of the deceased.

9. It is, then required to be considered that in reply to Question no. 20, the witness has said that one neighbor Babbhai was present at the time when the offence was committed. This Babbhai has not been examined before the trial court. Then, we find that in reply to Question no. 21, it has been deposed that one Patel was also present. But, the deceased could not name him. This shows that atleast two persons were present when the incident took place. However, none of them has been examined before the trial court. It appears that the chargesheet does not include the names of these two witnesses. None has explained as to why the said two persons have not been named in the chargesheet.

10. Now, if we treat the dying declaration to be a sufficient evidence on the basis of which an accused person can be convicted, then we also have to look to the position, that the dying declaration never discloses the name of the respondent. Moreover, the presence of two independent witnesses has been disclosed by the deceased to the Executive Magistrate and their evidence is not found on record. We feel that this is a material omission on the part of the State, in not examining the

two witnesses and in not obtaining the name of the assailant and in not recording the said name in the dying declaration of the deceased. Therefore, in our reading of the dying declaration, Ex.11, it does not support the case of the prosecution to any extent, since it does not disclose the name of the respondent.

11. Then we can also find a yadi, Ex.12, written by the police to the Executive Magistrate for recording the dying declaration of the deceased. There we can find that the name of the respondent was positively stated in it and it was further stated that the respondent had caused knife injury to the deceased, near his house. This would mean that the entire episode has been reproduced in the said yadi, Ex.12. In other words, the Executive Magistrate was posted with knowledge that the offence was committed by the respondent by using knife near the house of the respondent. Even then the name of the respondent has not been brought on record through the said dying declaration, Ex.11. The deponent has consistently said that one person had come there and he ran away after causing the said injury. This would mean that the dying declaration does not go to help the case of the prosecution to any extent.

12. Then, PW-3, Aaishaben Ibrahimbhai, Ex.13 has to be treated to be a very material and important witness. She is the wife of the deceased. She was cleaning vessels outside the house, at the time when the offence took place. The deceased was inside the room at about 2.00 to 2.30 p.m. on the date of the incident.

13. Then, we can look to the evidence of this witness. It has come on record through her evidence that the respondent had come to the house and had caused knife injury on the person of the deceased and therefore, the deceased raised shouts. On hearing the shouts, she went inside the room. She has also deposed that the respondent had run away. Then, she has further stated that she had not seen anybody causing injury to her husband. When she was questioned about her FIR, Ex.14, she has deposed that the police had obtained her thumb impression on the said FIR. But, she had no knowledge as to what was written therein. In other words, she has not proved the contents of the FIR, Ex.14.

14. Then, we can turn to her FIR, Ex.14. There also she has stated that the respondent had come there with motorcycle and had entered the house. Thereafter, she heard shouts. Therefore, her evidence is almost in conformity with the FIR, Ex.14. At the same time, it is

required to be considered that, so far, the dying declaration is concerned, it has been disclosed that one Babbhai and one Patel were there inside the room. But, the witness - Aaishaben has not referred these two persons. This would mean that at the time when the offence was committed, atleast three persons were present; the respondent and those two witnesses. It would, therefore, be difficult to hold that it was the respondent and the respondent alone who had committed the murder of his brother.

15. PW-6 - Roshanben Jamalbhai, Ex.18;
PW-7 - Fathmaben Ismailbhai, Ex.19;
PW-8 - Bhanuben Bhagwanjibhai, EX.20;
PW-9 - Urmilaben Vyas, EX.21;
PW-10- Taraben Narandas, EX-22;
PW-11- Manubhai Bawaji, EX.23; and
PW-12- Sundarji Devjibhai, EX-32; all have been treated hostile by the prosecution and they have not supported the case of the prosecution and therefore, it is needless to refer to their evidence.

16. PW-5 - Hajibhai Ismailbhai, Ex.16 was not a witness to the incident. PW-13 - Mastram Aghojarram, Ex.34 was a Constable on duty at Civil Hospital Police Choki on 19/01/87. He has stated that he maintains Register at the Hospital Police Choki. He has produced relevant entry at Mark 8/9, as the original was not forthcoming. The witness has no other information or knowledge about the incident in question. PW-14 Alokbhai Najbhai was a Constable on duty at Civil Hospital Police Choki on 07/02/87. The death of the deceased was reported to him and therefore, he made an entry in his diary. PW-15 - Kiritsinh Madhavsinh, Ex.36 says that the post-mortem of the deceased was performed and thereafter, he had handed over the dead body of the deceased to the uncle of the deceased and had obtained receipt to that effect, Ex.17. PW-16 - Ramanlal Sukhrambhai, Ex.37, was the PSO at the relevant point of time. He cannot throw any light on the case of the prosecution as he was not a witness to the incident. PW-17 - Mahendrakumar Ravishankar, Ex.45 was on duty as a Head Constable in the concerned Police Station on 19/01/87. Since, the injuries of the deceased were grievous, he contacted the PSI, Mr.Rathod and conveyed the said information to him. PW-18 - Motibhai Vichiyabhai Damor, Ex.47 was the Dy.S.P. at the relevant point of time. He had taken part in the investigation to some extent. PW-21 - Jagatsinh Rathod, Ex.62 was the PSI at the relevant point of time. He has also taken part in the investigation of the matter. No other witness was examined.

17. Considering the evidence as above, it is very clear that the material evidence on record, is that of Aaishaben who has not fully supported the case of the prosecution. She has given some sort of contradictory versions and it is difficult to rely upon the testimony of this witness. The dying declaration does not disclose the name of the respondent. On the contrary, it discloses the name of one Babbhai and one Patel, but, both of them have not been examined and even their police statements have not been found on record. In above view of the matter, in our view the trial court was justified in holding that the respondent is not proved to have committed any offence in the case. The reasonings and findings of the trial court do not appear to be wrong or false or against the weight of evidence on record. The learned APP was unable to show us the mistake committed by the trial court in appreciating the evidence on record. After all, this Court is hearing an acquittal appeal against an acquittal recorded by the trial court. In such type of appeal, this Court has to be slow in dislodging the reasonings and findings of the trial court. The innocence of the accused will also continue even in acquittal appeal. When the State has not been able to show that the trial court has committed error in appreciation of the evidence on record, then in that event, it would not be open to this Court to brush aside the reasonings of the trial court and the findings thereof. In other words, we find no error on the part of the trial court in appreciation of evidence and therefore, we find that there is no substance or merit in this appeal and consequently, we feel that the appeal deserves to the dismissed.

18. For the foregoing reasons, the appeal of the State is dismissed and the judgment and acquittal order recorded by the trial court are confirmed.

18.1 At this stage, Mr.D M Shah learned advocate for the respondent states that the respondent was unable to furnish surety. The Court had issued warrant against him, as he did not appear before the Court. So, he is still in jail. It is, therefore, made clear that if the respondent is still in jail, he shall be set at liberty forthwith if no longer required in any other case. A yadi be sent immediately to the concerned Jailor.

(D. P. Buch, J.)

(H. H. Mehta, J.)

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